IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.58 OF 2007

Bhima Baban More
residing at 54, E.P./172 Lohiyanagar
Pune ...Appellant.
V/s.
The State of Maharashtra ...Respondent.

Smt.Shraddha Mohite, adv. appointed for the Appellant.
Shri Y.S.Shinde, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 10th April, 2007.

ORAL JUDGMENT:

1. The appellant/accused was convicted by the Special Judge N.D.P.S.Act at Pune in N.D.P.S. Sessions Case No. 471 of 1991 for the offence punishable under Section 21 of the N.D.P.S. Act and was sentenced to undergo R.I. for 10 years and to pay fine of Rs.1 lakh and in default to pay fine he was to undergo further R.I. for two years. The appellant has preferred this appeal from the jail on limited point of sentence. According to him, he is physically handicapped and he is in jail for more than 8 years. If the sentence is reduced to some extent, he may be released.

2. Prosecution case in brief, is that on 3-7-1991 after getting an information that one Bhima More was in possession of Gard i.e, Heroin near Lohiya Nagar, PSI

Atmacharan Shinde after following all the mandatory formalities under the law, raided the place and found the accused conforming to the description given by the informant. On enquiry the accused confirmed that he was Bhima Baban More. He was informed that there was suspicion that he was in possession of Gard powder and his personal search was to be taken. He was offered choice of his personal search in presence of gazetted officer or the Magistrate. Thereafter in presence of the panch witnesses, his personal search was taken and 60 small packets containing in all 13 grams. 400 milligrams heroin was recovered from his pocket. Besides an amount of Rs.100/- was also found. These 60 packets were duly wrapped, tied and sealed in presence of panchas. Property was referred to C.A. and the C.A.Reports confirmed that it was Gard or heroin. After trial accused came to be convicted and sentenced as stated above.

3. The incident of this case had taken place on 3-7-1991 and the accused was convicted by the judgment dated 17th September, 1998. It is true that he had not preferred any appeal for a long time because he was in jail and because of the financial difficulties he could not afford to prefer appeal. Therefore, there was a long delay in filing the appeal. He preferred this

appeal through jail on 23-8-2005. Taking into consideration the fact that during the custody in jail he had suffered from gangrene and both of his legs were amputated, this Court felt that on humanitarian ground in spite of delay, the appeal should be admitted. As appeal is now admitted, it will be treated as continuation of the same criminal proceeding.

4. Section 21 of the N.D.P.S.Act as it stood prior to the amendment as per the N.D.P.S. (Amendment) Act, 2001 with effect from 2-10-2001, the offence under Section 21 was punishable with R.I. for a term which shall not be less than 10 years but which may extend to 20 years and also with fine which shall not be less than Rs.1 lakh but which may extend to 2 lakh rupees. In view of this mandatory provision, the learned trial Court awarded the minimum prescribed sentence as per the law. However, Amendment Act of 2001 made major changes. Section 21 was completely substituted by the new Section 21, which reads as follows:

> **"21. Punishment for contravention in relation to manufactured drugs and preparations --** Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be

punishable, --

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the Court may, for reasons to be recorded in the judgement, impose a fine exceeding two lakh rupees."

5. Thus, it appears that now by this amendment depending on the quantity of the narcotic drug collected, punishments are provided. In the case of small quantity, sentence of imprisonment may extend to six months or fine or both. In the case of commercial quantity, sentence of imprisonment shall not be less than 10 years but may extend to 20 years with fine which shall not be less than 1 lakh rupees but which may extend to 2 lakh rupees. However, if the quantity of drug is neither the small quantity nor the commercial quantity under the Clause (b) of Section 21, sentence may be R.I. for a term which may extend to 10 years

with fine which may extend to 1 lakh rupees. Therefore, under Section 21(b) maximum sentence of imprisonment of 10 years and fine of Rs.1 lakh is provided but there is no provision for minimum sentence to be awarded. It means in cases falling under clause (b) discretion is given to the Court to award sentence which may extend to imprisonment of 10 years and fine of Rs.1 lakh.

6. Section 41 of the N.D.P.S. Amendment Act, 2001 reads as follows:

> **"41. Application of this Act to pending cases--**
>
> (1) Notwithstanding anything contained in sub-section (2) of section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence :
>
> Provided that nothing in this section shall apply to cases pending in appeal.
>
> (2) For the removal of doubts, it is hereby declared that no Act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act had not come into force."

From this it is clear that if the offence was committed prior to Amendment Act coming into force, the accused

would be liable to be punished under the amended act if under the amended act, sentence prescribed for particular offence is less than what it was prior to the amendment or at the time of commission of the offence. However, this benefit was given only to the case where investigation was in progress or the case was pending before the Court. Under the proviso, it was declared that nothing in the Section 41 would apply to the cases pending in the appeal. It means that if the trial was already completed and sentence was awarded under the N.D.P.S. Act prior to its amendment but the appeal was pending, the case should be governed by the provisions of the N.D.P.S.Act as they stood prior to the amendment. Validity of the proviso to section 41 came in question. **Madhya Pradesh High Court in Ramesh v. State of Madhya Pradesh, Writ Petition No.537 of 2003 and Punjab and Haryana High Court in Ram Singh v. State of Haryana 2002(3) R. CRIMINAL R. (Cri) 728** struck down proviso to Section 41 of the amendment act holding that it was violative of article 14 of the Constitution of India. These two authorities were relied upon in a number of matters. In **Ramesh @ Kadu Dagdu Medge v. State of Maharashtra 2004(2) Bombay C.R. (CRIMINAL) 356,** this Court followed the above referred two authorities from Madhya Pradesh and Punjab & Haryana High Courts and held that proviso to section 41 is violative of article 14 of

the Constitution of India. It was held that when the offence was committed prior to the amendment and if the appeal is pending after the trial, the accused would be entitled to get benefit of the amended provisions of Section 21. In view of this legal position, it must be held that even though accused had committed the offence in the year 1991 and the trial Court convicted him in the year 1998, in the present appeal, he may be given benefit of amended provisions of Section 21.

7. As stated above, the accused was found in possession of 13 gms 400 mgs of heroin. In the case of heroin small quantity is described as 5 gms and the commercial quantity as 250 gms. The accused was found in possession of heroin, which was neither the small quantity nor the commercial quantity and as such his case should be governed by Section 21 clause (b). The report from Yervada Central Jail reveals that as on 31-10-2006 had already undergone imprisonment of 8 years one month and 14 days. After that the accused has been in jail for a further period of 5 months and 10 days. It means that he has actually undergone imprisonment for 8 years, 6 months and 24 days till this date. Taking into consideration the quantity of heroin found with him and the fact that in the year 2001 he had suffered from gangrene and in the year 2003 his both the legs were

amputated and now he is physically handicapped, I find that the sentence as already undergone, is sufficient. Therefore, the appeal to the extent of quantum of the sentence may be allowed.

8. Appeal is allowed. Impugned order passed by the trial Court stands modified as follows:

. Accused is convicted and sentenced under Section 21(b) of the N.D.P.S. Act and sentenced to undergo R.I. for 7 years and to pay a fine of Rs.20,000/- and in default to undergo R.I. for one year and six months. As he has already undergone this much sentence, he be set at liberty forthwith if not required in any other case.

(J.H.Bhatia,J.)